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No. 88-399

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILLIE HAMMOND
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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Of St. Louis

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QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretion under Supreme Court Rule 17.1 and issue Writ of Certiorari.

Terminal Railroad Association of St. Louis is a corporation, without any subsidiaries or affiliates. The Terminal Railroad Association of St. Louis stockholders are the Burlington Northern Railroad Company, the Missouri Pacific Railroad Company, the St. Louis Southwestern Railroad Company, and the Illinois Central Railroad Company.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case sets out unnecessary facts without support in the record before the trial court. Respondent herein sets forth a concise statement of the case as it was presented in the lower courts.

Petitioner's original complaint was purportedly brought pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.*, alleging that the respondent had twice brought formal charges against petitioner that were "inappropriate and unwar-

ranted." (Complaint, pp.1-2). The complaint alleged that petitioner suffered "deep depression and agitation" resulting from the charges. (Complaint, p.2). Petitioner's amended complaint alleged that respondent: 1) repeatedly and severely criticized petitioner; 2) set wildly unrealistic time estimates for tasks assigned to petitioner; 3) kept extraordinary close watch on petitioner's work; 4) induced petitioner to sign a waiver of his right to formal investigation by promising to discontinue disciplinary proceedings against him if he would do so; 5) contrary to its previous promise, issued an additional series of written charges against petitioner; 6) arbitrarily denied petitioner the right to "mark off" from work, thereby requiring him to remain working irregular hours; and 7) held a discipline hearing in petitioner's absence. (First Amended Complaint, pp.2-3). The amended complaint also alleged that these same infractions constituted a state tort claim for intentional infliction of emotional distress. (First Amended Complaint, pp.4-7).

Respondent timely moved to dismiss each complaint, alleging that the acts complained of in the complaints did not state a cause of action under the FELA, but constituted "minor disputes" under the Railway Labor Act, 45 U.S.C. §151 *et seq.* (RLA), and were therefore preempted by the mandatory arbitration procedures established by the RLA. (Motion to Dismiss, pp.1-2; Motion to Dismiss First Amended Complaint, p.1). The United States District Court for the Southern District of Illinois, Beatty, J., granted respondent's motion and dismissed the action. The United States Court of Appeals for the Seventh Circuit affirmed, finding that the allegations of the complaints did not constitute a claim under the FELA, but instead arose under the RLA. *Hammond v. Terminal R.R. Ass'n,* 848 F.2d 95 (7th Cir. 1988).

ARGUMENT

Petitioner seeks review of the seventh circuit's decision on four bases: (1) that the circuit courts are in conflict as to the proper

rule of law applicable to emotional injuries after this court's decision in *Buell v. Atchison, T. & S.F. Ry.*, 476 U.S. 1103, 107 S.Ct. 1410 (1987); (2) that the appellate court erred in dismissing petitioner's state law claim for intentional infliction of emotional distress; (3) that *Hammond* and its predecessor, *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 107 S.Ct. 1602 (1987), are in conflict with *Urie v. Thompson*, 337 U.S. 163 (1949); and (4) that *Hammond* is in conflict with the Supreme Court's decision in *Buell* for failing to apply state law relating to emotional injuries to petitioner's purported FELA claim. These characterizations by petitioner are incorrect, and the Petition for Writ of Certiorari should be denied for failure to state any special and important reasons pursuant to Supreme Court Rule 17.1 — which would require this court's review.

Plaintiff's assertion that this court should grant certiorari since the circuits are divided as to the proper rule of law applicable to emotional injuries is erroneous. Petitioner relies upon the ninth circuit's decision in *Buell v. Atchison, T. & S.F., Ry.*, 771 F.2d 1320 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 1103 (1987). This court expressly refused to affirm the ninth circuit's decision on the emotional injury issue, and noted that plaintiff's claim in *Buell* involved at least one episode of a "physical tort." *Buell*, 107 S.Ct. at 1418 & n.22. The seventh circuit and the ninth circuit are in agreement that an FELA action is stated if a physical tort is alleged. *Lancaster*, 773 F.2d at 813.

Petitioner's contention that post-*Buell* cases in the ninth circuit have reaffirmed the rule that wholly emotional injuries are compensible is inaccurate. *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986), decided after the *ninth circuit* appellate decision in *Buell*, was decided *prior* to this court's ruling in *Buell*. This court affirmed *Buell* on other grounds and specifically held that: "given the posture of this case, there was no reason for the Court of Appeals to express an opinion on [the wholly emotional injury] issue." *Buell*, 107 S.Ct. at 1418. Furthermore, the appellate court in Taylor specifically questioned the rule pronounced by

the ninth circuit in *Buell. Taylor,* 787 F.2d at 1313. The court in *Taylor* also recognized that the issue of wholly emotional injury was not squarely presented because, like *Buell,* a physical tort may have been involved. *Taylor,* 787 F.2d at 1313.

Given the fact the ninth circuit has not yet had an opportunity to fully consider *Lancaster* and the issue of the recoverability of wholly emotional injuries subsequent to the supreme court's decision in *Buell,* petitioner's assertion that a conflict between the seventh and ninth circuits exist is premature.

Plaintiff also attempts to rely on the conflict between the seventh circuit and the fifth circuit as a basis for invoking this court's review. *Compare Lancaster and Yawn v. Southern Ry.,* 591 F.2d 312 (5th Cir. 1979). However, the seventh circuit noted that plaintiff's complaint did not even comply with the requirements of *Yawn*, therefore, no conflict is presented in this case. *Hammond,* 848 F.2d at 98. Plaintiff's allegation that *Hagerty v. L & L Marine Services, Inc.,* 797 F.2d 256 (5th Cir. 1986) allows recovery for wholly emotional injuries without an accompanying "physical tort" is erroneous. The court on reconsideration specifically stated that emotional injuries were recoverable, *assuming the complaint stated an action* under the Jones Act. Given the modified opinion on rehearing, *Hagerty* cannot be construed as conflicting with the "physical tort" requirement of the seventh circuit.

Petitioner complains that the seventh circuit failed to address its claim for intentional infliction of emotional distress (Petition for Certiorari, p.13), and that, after the court found no FELA cause of action was stated, it incorrectly found a "minor dispute" existed, which was preempted under the mandatory provisions of the RLA. (Petition for Certiorari, p.11–16). Petitioner's contention that the court failed to address the Illinois common law claim is incorrect. The court set out the specific allegations of the amended complaint (which contained plaintiff's state law claim for the first time), (*Hammond,* 848 F.2d at 96), and concluded

that "[t]he amended complaint which Hammond then filed was not frivolous, but it was clearly barred by *Lancaster,* and therefore properly dismissed." *Hammond,* 848 F.2d at 98.

Petitioner also argues that the circuit court's decision in *Hammond* is in conflict with this court's decision in *Lingle v. Norge Div. of Magic Chef, Inc.,* 108 S.Ct. 1877 (1988). Plaintiff asserts that its claim was "independent" of the collective bargaining agreement. (Petition for Certiorari, p.12). First, it must be stressed that *Lingle* arose under the §301 of the Labor Management Relations Act rather than the RLA. The RLA has a greater preemptive effect. *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983), *cert. denied,* 464 U.S. 1007 (1984); *Lingle,* 108 S.Ct. at 1883 & n.8. As the supreme court stated in *Andrews v. Louisville & N. R.R.,* 406 U.S. 320, 323 (1972), "the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself."

Furthermore, *Lingle* concerned a claim for retaliatory discharge under §301. The court did not cite, and therefore, did not reverse its previous decision in *Andrews,* which involved a claim for retaliatory discharge under the RLA. Prior to the decision in *Lingle,* the circuit courts were in conflict regarding whether a claim for retaliatory discharge was preempted by §301. *Lingle,* 108 S.Ct. 1877, 1879 & n.1. No question has existed in the circuits since the decision in *Andrews* concerning the preemptive effect of the RLA in connection with retaliatory discharge claims.

Finally, *Lingle* was based on the reasoning that the petitioner's claim for retaliatory discharge could be decided independent of the collective bargaining agreement. In *Choate v. Louisville & N. R.R.,* 715 F.2d 369, 371 (7th Cir. 1983), the court found that a state claim for intentional infliction of emotional distress, under Illinois law, could not be decided independently of the collective bargaining agreement due to the nature of the state law tort.

Lingle is inapplicable to the RLA and claims for intentional infliction of emotional distress, especially as that tort is interpreted under Illinois law.

Petitioner argues that the decision in *Hammond* is in conflict with the Illinois appellate court's decision in *Milton v. Illinois Bell Telephone,* 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981). Clearly, since petitioner's claim is preempted by the provisions of the RLA and the state law claim is not independent of the collective bargaining agreement, no state law claim may be maintained. Furthermore, petitioner's allegations fall short of stating a claim under Illinois law. *Milton,* 427 N.E.2d at 831; *Public Finance Corp. v. Davis,* 66 Ill. 2d 85, 360 N.E.2d 765 (1977)(requiring extremely outrageous conduct); *Robbins v. Kass,* 163 Ill. App. 3d 927, 516 N.E.2d 1023 (1987)(physical manifestations required); *Lewis v. Westinghouse Electric Corp.,* 139 Ill. App. 3d 634, 487 N.E.2d 1071, 1073 (1985)(conduct must cause distress to person of ordinary sensibilities); *Buell,* 107 S.Ct. at 1416 n. 13.

Plaintiff also asserts that the decisions of the seventh circuit in *Lancaster* and *Hammond* are in conflict with the pronouncements in *Urie v. Thompson,* 337 U.S. 163 (1949). Petitioner implies that *Urie* requires an extremely broad view of the FELA, apparently broad enough to encompass wholly emotional injuries as a result of non-physical torts. This court in *Buell,* after citing the language in *Urie,* found that the interpretation of the FELA did not compel the conclusion that wholly emotional injuries are compensible. *Buell,* 107 S.Ct. at 1417–18.

CONCLUSION

Petitioner has failed to delineate any conflict between the decision in *Hammond* and decisions of the Supreme Court or other circuit courts. No "special and important" reasons for review have been presented, and this court should deny review pursuant to Supreme Court Rule 17.1.

Respectfully submitted,

TERMINAL RAILROAD
ASSOCIATION OF ST. LOUIS

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CERTIFICATE OF SERVICE BY MAIL

I, Richard M. Roessler, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Terminal Railroad Association of St. Louis, respondent herein, hereby certifies that on October 6, 1988, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the attached Brief in Opposition on the parties herein as follows:

On Billie Hammond, petitioner herein, by depositing such copies in the United States mail with first class postage prepaid, properly addressed to the post office address of Michael Wolff, Counsel of Record for Petitioner, 4144 Lindell Blvd., Suite 138, St. Louis, Missouri, 63108.

All parties required to be served have been served.

DATED October 6, 1988.

/s/ Richard M. Roessler